(2)

Supreme Court, U.S.
FILED
JAN 21 2000
OFFICE OF THE CLERK

No. 99-862

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ESCO WELCH, *Petitioner*,

v.

THE STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
MICHAEL E. BANISTER
Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General
State Bar No. 115210
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5977
Fax: (415) 703-1234
Counsel for Respondent

23pp

QUESTIONS PRESENTED

1. When a trial court finds a capital defendant competent to stand trial, but incapable of controlling his courtroom behavior, rebellious against authority, and subject to alternately invoking his right to self-represent and his right to representation at critical junctures as he did in a recent prior trial with a resulting mistrial, can it deny self-representation?

2. Must a trial court which denies self-representation due to a defendant's lack of self-control hold a hearing on the defendant's competence to stand trial?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	2
Petitioner's Prior Faretta Experience	3
Petitioner's Courtroom Behavior And The Trial Court's Rulings On His *Faretta* Motions	3
ARGUMENT	8
I. SINCE "THE RIGHT OF SELF-REPRESENTATION IS NOT A LICENSE TO ABUSE THE DIGNITY OF THE COURTROOM," A CONSTITUTIONAL BASIS EXISTS FOR DENYING SELF-REPRESENTATION TO A DEFENDANT WHO HAS BOTH ABUSED THE RIGHT IN THE RECENT PAST AND CONSISTENTLY DEMONSTRATED SEVERELY DISRUPTIVE COURTROOM BEHAVIOR	8

TABLE OF CONTENTS, CONT'D

II. **BECAUSE COMPETENCY IS NOT THE ONLY CONSIDERATION IN A SELF-REPRESENTATION DETERMINATION, DENIAL OF A *FARETTA* MOTION DOES NOT COMPEL A HEARING ON COMPETENCE TO STAND TRIAL** 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases	Page
Dusky v. United States 362 U.S. 402 (1960)	14
Faretta v. California 422 U.S. 806 (1975)	3, 10
Godinez v. Moran 509 U.S. 389 (1993)	10
Illinois v. Allen 397 U.S. 337 (1970)	12
Martinez v. Court of Appeal of California ___ U.S. ___ (2000)	11
McKaskle v. Wiggins 465 U.S. 168 (1984)	11
People v. Crandell 46 Cal. 3d 833 (1988)	4
People v. Joseph 34 Cal. 3d 936 (1983)	7
People v. Marsden 2 Cal. 3d 118 (1970)	4
People v. Pennington 66 Cal. 2d 508 (1967)	14, 15

TABLE OF AUTHORITIES, CONT'D

People v. Stankewitz
32 Cal. 3d 80 (1982) 14

People v. Welch
20 Cal. 4th 701 (1999) 1, 8, 14-16

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-862

DAVID ESCO WELCH, *Petitioner*,

v.

THE STATE OF CALIFORNIA, *Respondent*.

OPINION OR JUDGMENT BELOW

The Supreme Court of the State of California issued its published opinion on direct appeal, affirming petitioner's guilt and the judgment of death, on June 1, 1999, and denied rehearing on August 18, 1999. *People v. Welch*, 20 Cal. 4th 701 (1999). Petitioner appended a copy of the opinion to his petition at pages App.23 to App.115.

STATEMENT OF JURISDICTION

Petitioner asserts jurisdiction under 28 United States Code section 1257, subdivision (a).

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner invokes the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and quotes them on the first two pages of his petition.

STATEMENT OF THE CASE

By opinion dated June 1, 1999, the California Supreme Court affirmed petitioner's death judgment and his convictions for six counts of first degree murder with a multiple murder special circumstance, two counts of attempted murder, and one count of an ex-felon concealing a firearm, all arising out of the same incident in the early morning hours of December 8, 1986, in Oakland, California. The day before Barbara Mabrey was scheduled to testify against petitioner in an assault case, he threatened he would kill everyone in her family, waited until police left the home, then returned under cover of darkness with a gun and an accomplice and murdered six members of the Mabrey household, including two toddlers.

As we detail below, petitioner was ceaseless in his pretrial efforts to have himself and everyone else removed from the courtroom.[1] Petitioner filed more than two dozen motions to replace counsel and was, at the time of trial, on his third set of appointed attorneys. He moved numerous times to disqualify individual judges and the entire county bench, as well as to recuse the prosecutors. He had, during a previous trial, first insisted

---

1. Indeed, at several points during the trial he resorted to attacks on court personnel and the courtroom itself, fighting with bailiffs, overturning furniture, urinating in the jury well, and banging on walls. (RT 3708-3710, 3723, 3730, 4958.)

on representing himself, then insisted on not representing himself, resulting in delay and a mistrial. On the date set for trial to begin, he filed the self-representation motion at issue here. During the hearing on that motion and other pending motions, petitioner engaged in deliberately disruptive behavior.

Petitioner's Prior Faretta Experience

In the original assault case, which first came to trial before the capital case, petitioner invoked his rights under *Faretta v. California*, 422 U.S. 806 (1975), on the eve of trial and represented himself through jury selection. As testimony was set to begin, he sent a letter to the court, demanding the return of his dismissed attorneys because, he stated, he had not adequately understood "the problems that would be incident to representing himself and realized it is imperative that he have a competent attorney to represent him." (RT 82.) Counsel were reappointed, but delay and a mistrial resulted from the *Faretta* transitions.

Petitioner's Courtroom Behavior And The Trial Court's Rulings On His *Faretta* Motions

Trial was set for November 9, 1988, and continued to November 14 at petitioner's request, because he said he did not feel well. On the 14th, petitioner stated he needed a continuance to make a *Faretta* motion. (RT 9.) The court denied the motion for a continuance, but told petitioner he could file a motion and affidavit on his *Faretta* issue if he wanted the court to make a ruling. (RT 9.) A search of the court record established petitioner had filed a self-representation motion with the trial court on November 8, the original eve of trial, but had served neither the People nor his own counsel. (RT 10.)

The court agreed to hear the motion November 21, to give itself and counsel time to read the motion, to give petitioner time to complete a questionnaire concerning the rights he would be giving up and the difficulties he would encounter if he represented himself, and to permit a court-appointed psychiatrist to examine petitioner on his competency to waive counsel. (RT 12, 18-20, 42-44, 59, 66, 71.) Petitioner refused to see the psychiatrist. (RT 59-60, 72, 83.)

Although represented by counsel, petitioner made several attempts to interrupt the court to make statements during the discussion of other pending motions. The court had to remind him to be quiet several times. (See RT 38-39, 73.) Petitioner informed the court he had filed a complaint in federal court naming every municipal and superior court judge on the Alameda County bench as a coconspirator so that he could disqualify all the judges in the jurisdiction. (RT 45-48.)

On Monday, November 21, 1988, the matter came on for hearing and ruling on the *Faretta* motion. The court reviewed the earlier *Marsden* hearing[2] before Judge Ballachey, transcripts of petitioner's assault trial in which he had declared himself incapable of representing himself after invoking his right to self-representation on the eve of trial, and hearings before Judge Pulich, in addition to the pleadings on the *Faretta* motion. The court made the following ruling:

---

2. The reference is to *People v. Marsden*, 2 Cal. 3d 118 (1970) from which California courts derive the rule that an indigent defendant can have court-appointed counsel replaced if counsel is not providing adequate representation or defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result, such as when a total breakdown in communications occurs due to factors that are not within the control of the defendant. *People v. Crandell*, 46 Cal. 3d 833, 854 (1988).

"The question the Court has to decide is whether the defendant has the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and the consequences of his action. [¶] The ability to waive must further be deemed to embody some minimal ability to present a personal, competent defense. If unable to present such effective defense, the defendant would lack capacity to stand trial without benefit of counsel even though the Court finds and this Court does find that he is capable of actually standing trial.

The Court determines that the defendant is not mentally competent to waive counsel and represent himself for the following reasons: The defendant's mental condition in the Court's opinion precludes realistic assessment of the need for assistance and risk of waiving counsel. Mr. Welch alleges conspiracy between the parties to the judicial system. In the matter heard before Judge Ballachey, he alleges conspiracy in these proceedings. I've listed just a few acts . . . [quoting conspiracy allegations from transcripts in motions heard by Judges Ballachey and Pulich].

The Court -- defendant further the Court finds engaged in court disruption. The defendant engaged in verbal displays and interrupts and interferes with the conduct of courtroom proceedings. He constantly interrupts the Court and counsel. I have examined those transcripts by Judge Pulich and Judge Ballachey. [¶] He further accuses the bailiff with tampering with his legal papers. He's asked me to have his attorneys sit in the jury box rather than the counsel table. The defendant's reluctant to

respond to the questions by the Court, going on as to how his civil rights are being abused."

Petitioner here interrupted the court. (RT 77.) The court went on to give specific examples of how petitioner had in previous court appearances, engaged in disruptive physical displays, including turning his back on the court and reporter, making nonsensical motions, and stating his own inability to appear in court based on stress, what petitioner described as a "mental breakdown," and inability to proceed. (RT 79-80.) Petitioner interrupted again, making thirteen separate statements after the court told him to keep quiet while the court was speaking. (RT 81-82.)

The court read into the record portions of petitioner's letter seeking to undo the *Faretta* invocation after jury selection in the assault case. (RT 82.) The court concluded, as follows:

> "I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom. I further find that one of the defendant's reasons he wishes to dispense with defense attorney is a paranoid distrust of everyone connected with the judicial system. This is further evidence to this Court that he lacks the mental capacity to truly waive his right to counsel. Further, the defendant's history of improper if not irrational behavior in speaking in the courtroom in the Marsden hearing, 995 hearing further indicates doubt to this Court that he has the mental capacity to waive counsel. Further, as I indicated, in Action Number 87170, when given the opportunity to be his own attorney, he could not continue, asked for counsel."

(RT 84-85.) The court concluded with a cite to *People v. Joseph*, 34 Cal. 3d 936, 671 P.2d 843 (1983), as petitioner continued to try to interrupt. (RT 85-86.)

ARGUMENT

I.

SINCE "THE RIGHT OF SELF-REPRESENTATION IS NOT A LICENSE TO ABUSE THE DIGNITY OF THE COURTROOM," A CONSTITUTIONAL BASIS EXISTS FOR DENYING SELF-REPRESENTATION TO A DEFENDANT WHO HAS BOTH ABUSED THE RIGHT IN THE RECENT PAST AND CONSISTENTLY DEMONSTRATED SEVERELY DISRUPTIVE COURTROOM BEHAVIOR

The California Supreme Court upheld the trial court's denial of petitioner's motion to represent himself on grounds other than his competence. The California Supreme Court affirmed on the basis of the trial court's findings that petitioner was committed to disruption of the trial and took note that petitioner had a history of failure in representing himself.[3]

---

3. The California Supreme Court summarized the record of disruption prior to the decision on the *Faretta* motion as follows: "He belligerently denied awareness of a calendar date that was set in his presence; he turned his back on the trial court when addressing it; he interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point; he accused the court of misleading him; he refused to allow the court to speak and he refused several times to follow the court's admonishment of silence. We are also aware that the extent of a defendant's disruptive behavior may not be fully evident from the cold record, and that one reason for according deference to the trial court is that it is in the best position to judge defendant's demeanor." *People v. Welch*, 20 Cal. 4th at 735, Pet. App. 43.

In context, the *Faretta* motion was part of an elaborate and persistent effort to delay or prevent trial. It will be remembered that the present case arose because petitioner decided to kill or punish the witnesses to his prior assaults on members of the Mabrey family. Only weeks before making the *Faretta* motion to which the present petition is addressed, petitioner made a *Faretta* motion on the eve of trial in the assault case, then caused delay and a mistrial when, after jury selection, he declared himself incapable of proceeding and demanded that counsel be appointed. His repeated efforts to remove or disqualify judges and attorneys from the present case were reviewed by the court.[4] The court also reviewed petitioner's disruptive efforts, efforts of the sort which, when committed in front of a jury, require removal of the defendant from the courtroom.[5] Thus petitioner's *Faretta* motion must, in context, be recognized as part of

---

4. In superior court alone, petitioner made at least eight motions to disqualify individual judges or the entire bench, at least three motions to remove or replace appointed counsel, and three motions to recuse the District Attorney before the hearing on the *Faretta* motion at issue here. (Judges: CT 699, 720-24 (two motions), 1931, 2037, 2043, 2111, 2127; Defense Counsel: CT 470, 1936-47, 2117; Recusal: CT 705, 2043, 2117.) By the conclusion of trial, appellant had filed two dozen or more motions to replace counsel.

5. Petitioner ultimately achieved removal from the courtroom a dozen times during the trial, beginning with the same day his *Faretta* motion was heard. (RT 146-147, 191-193, 210-211, 1915-1918, 3709-3720, 3864-3883, 4593-4594, 4960-4965, 5471-5472, 5488-5557, 5950-5951, 6213.)

a pattern of motions and disruptive behaviors designed to prevent a trial by eliminating any one or more of the essential participants (witnesses murdered, judges disqualified, defense attorneys dismissed, prosecutors recused, the jury delayed, the defendant removed).

It is a gross and erroneous oversimplification to state that the determination of whether to grant a *Faretta* motion is identical to the determination of whether a defendant is competent to stand trial. The issues overlap at competency, but competency is not the be-all and end-all of self-representation. "When a defendant seeks to waive his right to counsel, [there must be] a determination that he is competent to stand trial . . . and the waiver must also be intelligent and voluntary before it can be accepted." *Godinez v. Moran*, 509 U.S. 389, 400-401 (1993). The request must be timely. The defendant must be "made aware of the dangers and disadvantages of self-representation." (*Id.*)

Of critical importance to the present case, the grant of a *Faretta* motion has always been subject to termination if the defendant "deliberately engages in serious and obstructionist misconduct" because "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. at 834-835, fn. 46. "[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently

forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 177, fn. 8 (1984). This Court recently recognized that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of California*, ___ U.S. ___ (2000), 2000 WL 16311 *6. The only step the California Supreme Court took beyond *Faretta* and *Martinez* is to recognize that if a court has the immediate right to terminate *Faretta* self- representation for serious and obstructionist misconduct, then it must also have the right to deny self-representation where a defendant's history of serious and obstructionist misconduct renders termination inevitable. Such a logical extension is doubly valid where the defendant also has a history of *Faretta* gamesmanship from which he learned that delay and a mistrial can be achieved by demanding *Faretta* self-representation on the eve of trial, then demanding an attorney once the jury is selected.[6] The Constitution does not require a court to play along with a defendant who is playing for a mistrial.

Moreover, a defendant cannot represent himself from the holding cell. If a defendant insists on behaving

---

6. While the costs, both monetary and opportunity, of selecting a jury in any criminal case are substantial, the costs involved in selecting a capital case jury are monumental.

"in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom" (*Illinois v. Allen*, 397 U.S. 337, 343 (1970)), the trial court can remove him without stopping the trial, precisely because he has an attorney who can continue to represent his interests in court. A self-representing defendant with a behavior problem has the power to bring a halt to proceedings simply by misbehaving.

For these reasons, it must be true that a trial court can find a defendant competent to stand trial but so incapable of controlling his behavior, or so manipulative, that the right to self-representation must be denied.

That said, respondent recognizes that the trial court, ruling in 1988, couched its findings for the most part in the language of competency without the benefit of this Court's opinion in *Godinez* v. *Moran*. While respondent believes the judgment is properly affirmed on the basis of petitioner's behavioral problems and past history with self-representation, as detailed by the trial court in ruling on the motion, this case raises an interesting question about competency: How is a court to deal with a defendant who is clearly competent to stand trial, but whose particular form of incompetence is the inability to appreciate his need for counsel or the risk involved in waiving counsel?

Godinez v. *Moran* tells us that the test for competence to stand trial is the ability to understand the nature of the criminal proceedings and assist counsel in the conduct of a defense in a rational manner. *Godinez*

v. *Moran* also reminds us that competence is only part of the inquiry. The defendant must also make a knowing and intelligent waiver of his right to be represented by counsel. Petitioner in the present case was found competent to stand trial, but incapable of making a knowing and intelligent waiver of his right to counsel. Since both are essential, respondent submits, self-representation was properly denied on this basis as well.

Certiorari is not required to point out what was obvious to the California Supreme Court, that a deliberately disruptive defendant need not be permitted to represent himself despite competence to stand trial.

II.

BECAUSE COMPETENCY IS NOT THE ONLY CONSIDERATION IN A SELF-REPRESENTATION DETERMINATION, DENIAL OF A *FARETTA* MOTION DOES NOT COMPEL A HEARING ON COMPETENCE TO STAND TRIAL

Petitioner asserts that since the competency standard for self-representation is deemed to be the same as the standard of competence to stand trial, a defendant denied her right to self-represent is necessarily incompetent to stand trial, or must at least be given a hearing on the question. This mutual exclusivity formulation of the issue places trial courts in a dangerous position in which a choice must be made on competency with reversal per se the result for error in either direction. As the California Supreme Court recognized, however, competency is not the only issue in evaluating a motion to self-represent. Without the symmetry petitioner assumes, it is clear that a trial court can both deny self-representation and find competence to stand trial is not even in doubt.

The rule in California, as restated in the opinion in this case, is that once an accused has come forward with substantial evidence of incompetence to stand trial, due process requires that a full competence hearing be held as a matter of right, even if the evidence is in conflict. *People v. Welch*, 20 Cal. 4th at 737-738, Pet. App. 47; *People v. Stankewitz*, 32 Cal. 3d 80, 91-93, 648 P.2d 578 (1982); *People v. Pennington*, 66 Cal. 2d 508, 516-517, 426 P.2d 942 (1967). California applies the standard enunciated in *Dusky v. United States*, 362 U.S. 402 (1960), that a defendant's competence to stand trial consists of "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "rational

as well as factual understanding of the proceedings against him."

"Substantial evidence" in this context is evidence that raises a reasonable doubt concerning the defendant's competence to stand trial. While the California Supreme Court noted that the substantial evidence test is met when a psychiatrist or qualified psychologist testifies to her well-informed opinion that mental illness is causing the defendant to be incapable of understanding the purpose or nature of the criminal proceedings or is incapable of assisting in his defense or cooperating with counsel, it in no way suggested that was the only way to meet the test. *People v. Welch*, 20 Cal. 4th at 738, Pet. App. 47-48; *People v. Pennington*, 66 Cal. 2d at 519, 426 P.2d 942. Nor did it require, as petitioner somewhat absurdly suggests, that a defendant must cooperate with a psychiatrist in order to establish he cannot cooperate with counsel.

What the California Supreme Court did hold is that neither was there evidence of incompetence to stand trial provided by the defense, nor did the evidence of petitioner's lack of self-control and distrust of the legal system amount to substantial evidence of incapacity to stand trial.[7]

Certainly the trial court, in the pre-*Godinez* v. *Moran* environment, spoke in terms of incompetence and erroneously invoked notions of petitioner's ability to present a defense in denying his *Faretta* motion. However, these very errors (unimportant to the *Faretta*

---

7. "In the present case, the circumstances noted by the court -- that defendant and his counsel did not agree which defense to employ, and that defendant had a paranoid distrust of the judicial system and had stated his counsel was in league with the prosecution -- while suggesting the trial court could have ordered a hearing on competence to stand trial, do not establish that the trial court abused its discretion in failing to do so . . . ." *People v. Welch*, 20 Cal. 4th at 742, Pet. App. 54.

determination in light of the deliberate disruption finding) establish that the trial court's finding petitioner was competent to stand trial was not inconsistent with its decision to deny the motion for self-representation. The trial court's discussion of "competence" to self-represent was really a discussion of "competence" to mount a legal defense. The finding is properly rejected under *Godinez* v. *Moran* as an improper *Faretta* consideration and cannot, therefore, be used under the same case to establish "incompetence" to stand trial. The lesson of *Godinez* v. *Moran* is that competence to present a legal defense is a higher standard not applicable to either self-representation or competence to stand trial. "Because the trial court's findings clearly suggest that the court was assessing these additional factors (realization of the probable risks and consequences of his action and knowing and voluntary waiver of the right to counsel), its ultimate determination that defendant was not competent to represent himself reflected a more demanding standard and a wider set of factors than was appropriate for the determination of defendant's competence to stand trial." *People v. Welch*, 20 Cal. 4th at 741, Pet. App. 53.

For these reasons, the California Supreme Court's conclusions that the trial court's *Faretta* findings do not constitute substantial evidence of incompetence to stand trial and that the trial court did not abuse its discretion in not declaring a doubt as to defendant's competence to stand trial are both consistent with *Godinez* v. *Moran*.

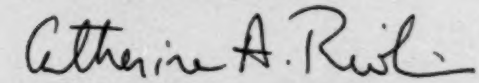
CONCLUSION

Accordingly, respondent respectfully submits that the petition for writ of certiorari should be denied.

Dated: January 21, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
MICHAEL E. BANISTER
Deputy Attorney General



CATHERINE A. RIVLIN
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

CAR/cr/gm
SF1989XS0003